not now be heard to argue that the courts below somehow failed to pass upon it.†

III. This Case Warrants This Court's Review

As demonstrated in the petition and further demonstrated above, the decision of the court of appeals is manifestly incorrect on both questions presented and conflicts with decisions of this Court. That alone is a fully sufficient basis for further review. Perhaps more importantly, though, this case presents the Court with an opportunity to rein in an agency that, at least for a period of time in the 1980's and 1990's, had thoroughly run amok, routinely flouting federal and state authority. *See, e.g., FDIC v. Hurwitz*, 384 F. Supp. 2d 1039 (S.D. Tex. 2005) (awarding $72 million in attorneys' fees as sanction for FDIC's litigation misconduct). An equitable action for breach of fiduciary duty is the only recourse shareholders have to guard against most acts of misfeasance or malfeasance perpetrated by a receiver. If what is equitable is delimited only by the receiver's power and authority, the re-

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† That petitioner might not have identified in the courts below all of the many legal infirmities in the FDIC's standing argument is of no consequence. As the cases cited by the FDIC indicate, to preserve an argument for appellate review, a litigant is not required to present in the courts below every authority in support of its position, or every flaw in every argument of the opposition; this Court finds questions to be unpreserved for review only when a litigant fails to raise or the court below fails to decide the underlying substantive claim or defense—not a particular authority or argument in support. *See, e.g., Youakim*, 425 U.S. at 234 (acknowledging maxim, but considering a Supremacy Clause argument raised for the first time on certiorari in any event, finding the question to be exceptionally important); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to consider a question raised in a petition, where petitioner had attempted to bring the claim via an amended complaint and the amendment had been rejected as untimely). *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), does not even remotely stand for the proposition for which the FDIC cites it. *See* Opp. 14. *Zobrest* examined the canon of constitutional avoidance—and found it inapplicable on the facts of that case. *Id.* at 8.

ceiver's fiduciary duties would be reduced to obedience to law *simpliciter*. Such would be the consequence of allowing the decision below to stand; yet this would work a fundamental change in the fiduciary obligations of receivers. *See, e.g., Mosser v. Darrow*, 341 U.S. 267, 271 (1951). Adherence to the traditional view mandates review, and reversal, of the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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